

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Downtown Fernandina Beach Station
Fernandina Beach, FL

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Docket No. A2013-7

PUBLIC REPRESENTATIVE'S OPPOSITION TO
POSTAL SERVICE'S NOTICE OF FILING ERRATA

(September 13, 2013)

On September 10, 2013, the Postal Service filed a notice of an erratum, which states that the Final Determination filed on August 9, 2013 "was an earlier draft" and represents that the erratum contains the Final Determination that was posted in the Downtown Fernandina Beach post office.¹ For the following reasons, the Public Representative urges the Commission to exclude the erratum from the Administrative Record.²

¹ Notice of the United States Postal Service of Filing Errata, September 10, 2013 (Administrative Record Filing No. 4).

² Changing the document designated as the "Final Determination" well over six weeks into a proceeding is a change so significant that it should not have been filed as an erratum. Thus, the Commission should treat the Postal Service's notice as a Motion for Substitution and this pleading as an opposition thereto.

I. Background

In Order No. 1789, the Commission set the procedural schedule for this proceeding.³ The procedural schedule mandated an August 1, 2013 deadline for the Postal Service's filing of the Administrative Record. Order No. 1789 at 5. On August 1, 2013, the Postal Service filed "the electronic version of the administrative record concerning the Final Determination to Close the Fernandina Beach Downtown Station and Continue to Provide Service By Contract Postal Unit."⁴ After reviewing Administrative Record Filing No. 1, the Public Representative requested an extension of time for responding to the Postal Service's motion to dismiss because Administrative Record Filing No. 1 was missing several key documents, including the final determination.⁵ In its order granting the motion, the Commission emphasized:

The due date for filing the complete Administrative Record was August 1, 2013. Timely review of this appeal cannot be undertaken without the complete Administrative Record. The Postal Service *shall file all documents necessary to complete the Administrative Record no later than August 13, 2013.*⁶

On August 9, 2013, the Postal Service filed a supplement with additional documents to be included in the Administrative Record.⁷ In that filing, the Postal Service represented that Item No. 35 was "the Final Determination from headquarters." Administrative Record Filing No. 2 at 1. On August 14, 2013, the Postal Service filed a motion for late acceptance and an additional supplement with additional documents for the Administrative Record.⁸ Despite the fact August 1, 2013 was the deadline for filing the

³ Notice and Order Accepting Appeal and Establishing Procedural Schedule, July 24, 2013, at 5 (Order No. 1789).

⁴ United States Postal Service Notice of Filing Administrative Record, August 1, 2013, at 1. The partial administrative record was attached to the Notice (Administrative Record Filing No. 1).

⁵ Consent Motion for an Extension of Time to File Responses to the Postal Service's Motion to Dismiss, August 6, 2013.

⁶ Order Granting Motion for Extension and Establishing Due Date for Submission of Documents, August 7, 2013, at 2 (Order No. 1800) (citations omitted and emphasis added).

⁷ United States Postal Service Notice of Filing of Supplemental Documents for Inclusion in the Administrative Record, August 9, 2013 (Administrative Record Filing No. 2).

⁸ Motion for Late Acceptance, August 14, 2013 (Late Acceptance Motion); United States Postal Service Second Notice of Filing of Supplemental Documents for Inclusion in the Administrative Record, August 14, 2013 (Administrative Record Filing No. 3).

complete Administrative Record, the Postal Service asserted that this filing was “one day out of time.” Late Acceptance Motion at 1.

On August 15, 2013, the petitioner requested an extension of the deadline for filing the initial brief, in part due to the Postal Service’s delayed and piecemeal filing of the Administrative Record.⁹ In granting the petitioner’s request, the Commission again emphasized that “[t]he Postal Service must take appropriate action to ensure that complete Administrative Records are timely filed given the statutory 120-day decisional schedule for post office appeals.”¹⁰ The Commission noted that this was “the second request for extension of deadlines . . . due to the late filing of elements of the Administrative Record.” Order No. 1811 at 2. Most recently, on September 10, 2013, over five weeks after the August 1st deadline and after being twice-cautioned for delayed filing of the Administrative Record, the Postal Service filed the erratum, containing a new Final Determination. Administrative Record Filing No. 4 at 1.

The Postal Service received notice that there were inconsistencies concerning the Final Determination on August 13, 2013, at the latest. Just four days after the August 9, 2013 filing of the initial Final Determination, the petitioner notified the Commission that the Final Determination contained in Administrative Record Filing No. 2 was “materially different” from the Final Determination posted in the Downtown Fernandina Beach post office.¹¹ On August 15, 2013, the issue was raised again by the Public Representative in her response to the Postal Service’s motion to dismiss.¹² Again, on September 4, 2013, the petitioner raised the issue of the two Final Determinations in his initial brief.¹³ Twenty-eight days after the petitioner first identified the existence of two final determinations and forty days after the initial deadline for filing the complete Administrative Record, the Postal Service filed a revised Final

⁹ Petitioner’s Motion to Extend the August 21, 2013 Filing Date Deadline for the Petitioner’s Form 61 or Initial Brief in Support of the Petition by Two Weeks, August 15, 2013.

¹⁰ Order Granting Motion to Extend Filing Deadline, August 16, 2013 at 2 (Order No. 1811).

¹¹ Petitioner Request to Affirm Appeal and Stop Closing, August 13, 2013, at 1 (Petitioner Request). Petitioner attached a copy of the Final Determination that was posted at the Downtown Fernandina Beach post office to his filing.

¹² See *e.g.*, Public Representative’s Opposition to the Postal Service’s Motion to Dismiss, August 15, 2013, at 9 n.26.

¹³ Petitioner’s Initial Brief in Support of Petition, September 4, 2013, at 1.

Determination to remedy “[t]he inadvertent submission of the earlier draft of the Final Determination.” Administrative Record Filing No. 4 at 1.

II. The Postal Service’s Erratum is Untimely and Highly Prejudicial.

The Postal Service’s erratum is untimely and highly prejudicial to both the Commission’s review and the participants in this proceeding. In this proceeding, the Commission has repeatedly emphasized the importance of a timely filing of the complete Administrative Record. Order No. 1800 at 2; Order No. 1811 at 2. The initial deadline for the Administrative Record was August 1, 2013. Order No. 1789 at 5. That deadline was subsequently extended to August 13, 2013. Order No. 1800 at 2. The September 10, 2013 erratum is inexcusably untimely.

In Administrative Record Filing Nos. 2 and 3, the Postal Service filed notices of supplementation, which were accompanied by a Motion for Late Acceptance when appropriate. Despite the fact that the erratum contains a new version of the document most central to the appeal, the Final Determination, the Postal Service did not file a motion for late acceptance or notice or motion of supplementation of the record. Instead, it presents an erratum, cites “inadvertent submission of the earlier draft,” and provides no explanation for the delay. Commission rule 3025.21 allows the Commission to alter the time for the filing of the Administrative Record “for good cause.” 39 C.F.R. § 3025.21. Since no explanation for the tardiness of the Postal Service’s filing was provided, the Commission should reject the Postal Service’s erratum.

In addition, the Postal Service’s filing causes substantial prejudice to the rights of all participants in this proceeding. While the Postal Service asserts that it “does not believe any party is prejudiced” by its new Final Determination, the Public Representative finds the Postal Service’s filing highly prejudicial. Administrative Record Filing No. 4 at 1. *Black’s Law Dictionary* defines prejudice as “damage or detriment to one’s legal rights or claims.”¹⁴ The Final Determination is the most important document in the Administrative Record. In accordance with section 404(d)(5), the petitioner appeals the final determination, and the Commission reviews “such determination on

¹⁴ *Black’s Law Dictionary* (9th ed. 2009).

the basis of the record before the Postal Service in making such determination.” Then the Commission may affirm or remand the determination, but not modify it. 39 U.S.C. § 404(d)(5).

In appellate proceedings before the Commission, the petitioner’s initial brief “shall be filed not more than 20 days after the filing of the administrative record.” 39 C.F.R. § 3025.41. The petitioner’s case for remand is based almost exclusively on the contents of the Final Determination included in the Administrative Record. In this proceeding, the petitioner’s brief was due September 4, 2013. Nearly a week after the petitioner’s briefing deadline, the Postal Service changed the document it designated as the Final Determination. By waiting for the petitioner’s briefing deadline to pass before filing the new Final Determination, the Postal Service has caused substantial harm to the petitioner. The new Final Determination also harmed other interested parties, including the Public Representative, that have already filed pleadings based on the initial Final Determination filed on August 9, 2013.¹⁵ Due to the substantial prejudice caused by the erratum, the Commission should exclude the Postal Service’s September 10th filing from the Administrative Record.

III. The Administrative Record is Inadequate and Unreliable.

The Administrative Record in this proceeding is so unreliable that the Public Representative does not know which proposal and which final determination are the documents on which she should base her comments. Because the Administrative Record has been filed piecemeal in four separate filings over a near six-week period, the Public Representative does not believe there is a clear record on which she can comment and on which the Commission can conduct its review. The complete Administrative Record should have informed the Postal Service’s decision-making process, so it is alarming that the Administrative Record has been gradually filed with the sudden appearance of several key documents.

The Administrative Record contains two date-stamped documents entitled “Proposal to Close the Fernandina Beach Downtown, FL Station and Continue to

¹⁵ The Public Representative had also prepared a substantial portion of her comments, which she planned to timely file later this month, based on the Final Determination filed on August 9, 2013.

Provide Service by Contract Postal Unit.”¹⁶ The date stamps on the two proposals contain identical date of posting and date of removal stamps from Fernandina Beach, USPS 32034. See *id.*, item 16, item 23.¹⁷

The proposals differ significantly content. In the “Effect on Employees” section of the first proposal, the proposal states: “There is currently a Postmaster assigned to this unit. The Postmaster may be moved to another facility if possible. Additionally there are 48 craft employees assigned to this unit. These employees will be relocated per the National Labor Agreements.” *Id.* at 35. The “Effect on Employees” section of the second proposal states very different facts— “[c]urrently only 1 employee works at the Downtown Station. Employee would be relocated to Main Post Office appromiximatly [sic] 3 miles away.” *Id.* at 597. The first proposal states that there are 625 P.O. Box or general delivery customers, while the second identifies 548. *Id.* at 35, 597. Despite the large number of P.O. Box customers, only the second proposal explains where replacement Post Office Box service will be available, a fact omitted from the first proposal. *Id.* at 596.

The Administrative Record contains no explanation for the competing date-stamped proposals, differing content, or why the proposals were signed on the same day by different individuals.¹⁸ There is also no explanation as to which proposal was posted in the Downtown Fernandina Beach post office or on which proposal comments were received.

While the dualing proposals are reason enough to question the integrity of the Administrative Record, the Postal Service has filed two versions of the Final Determination—and the petitioner has provided a third version that was posted in the

¹⁶ Since both proposals are labeled as “item 17,” the Public Representative will cite to the page number of the Administrative Record (page number in the .pdf document) rather than the item number. The first proposal follows item 16, while the second follows item 23. Administrative Record Filing No. 1 at 31-35, 596-97.

¹⁷ The stamps for the first proposal appear on the Invitation for Comments letter to patrons, while the stamps for the second proposal appear on the cover sheet of the second proposal. *Id.*

¹⁸ The first was signed by Charlotte M. Cutlip, although the signature line reads “Keith Pierle, Manager, Post Office Operations.” *Id.* at 35 (as compared to Ms. Cutlip’s signature on item 16). The second was signed by Stephen Hardin, also “Manager, Post Office Operations.” *Id.* at 597. The Commission may also want to inquire as to why Ms. Cutlip’s signature appears where Mr. Pierle’s should.

Downtown Fernandina Beach post office.¹⁹ The two final determinations provided by the Postal Service were signed approximately two weeks apart by the same individual. Final Determination No. 1 at 7; Final Determination No. 2 at 7.

Although the Postal Service represents that the only difference between its two Final Determinations is the “economic savings section,” a closer review of the two Final Determinations demonstrates that is simply incorrect. Administrative Record Filing No. 4 at 1. In the “Responsiveness to Community Postal Needs” section, Final Determination No. 1 discusses the building’s condition and presence of mold. Final Determination No. 1 at 1. No such facts were included in Final Determination No. 2. Final Determination No. 2. at 1. In addition, the differences between the economics savings sections are not *de minimus*. Final Determination No. 1 contains a 300% higher 10-year estimated savings than Final Determination No. 2. Final Determination No. 1 at 6; Final Determination No. 2 at 6. The Final Determination No. 1 estimates a \$992,445 10-year savings,²⁰ including \$591,250 in EAS Craft & Labor. Final Determination No. 1 at 6. Final Determination No. 2 estimates a \$315,359 10-year savings, including no savings for EAS Craft & Labor. Final Determination No. 2. at 6. The differing savings estimates are also listed again in the Final Determinations’ summaries. Final Determination No. 1 at 6; Final Determination No. 2 at 6.

While Final Determination No. 2 mirrors Final Determination No. 3 in content, both the Postal Service and the petitioner represent that the Final Determination each filed was the one posted in the Downtown Fernandina Beach post office. Notice at 1; Petitioner Request at 1. If both documents were the document posted in the Downtown Fernandina Beach post office, one would expect them to be identical. Final Determination No. 2 and Final Determination No. 3 are not. The date-stamped cover sheet of Final Determination No. 2 and the date-stamped cover sheet of Final Determination No. 3 do not match. By comparing the placement and angle of the date stamps, it is clear that Final Determination No. 2 and Final Determination No. 3 are not

¹⁹ See Administrative Record Filing No. 2, item 35 (Final Determination No. 1); Administrative Record Filing No. 4, item 35A (Final Determination No. 2); Petitioner’s Request to Affirm Appeal and Stop Closing, August 13, 2013, Attachment (Final Determination No. 3).

²⁰ In fact, Final Determination No. 1 categorized the savings as “Total 10 yr Net Present Value (NPV)” as opposed to the other’s “Total Ten Year Savings.” Final Determination No. 1 at 6; Final Determination No. 2 at 6.

the same document. *Compare* Final Determination No. 2 at 1 *with* Final Determination No. 3 at 1. Unless three Final Determinations are posted at the Downtown Fernandina Beach post office, it is unclear from the record which of these Final Determinations was actually posted at the Downtown Fernandina Beach post office on July 9, 2013.

Among the Final Determinations, it is also unclear which was actually intended to be included in the Administrative Record. The Postal Service has long used bate-stamps containing the docket number, item number, and page number to mark the upper left-hand corner of documents in the Administrative Record. See e.g., Administrative Record Filing No. 1 at items 1-6. The standard bate-stamp was applied to Final Determination No. 1. See Administrative Record Filing No. 2 at item 35. However, the standard bate-stamp is missing from Final Determination No. 2, the Final Determination that the Postal Service now asserts is the correct one. See Administrative Record Filing No. 4 at item 35A. The lack of bate-stamp likely indicates that Final Determination No. 2 was never included in the Administrative Record for this proceeding. The missing bate-stamp and the lateness of the filing raise substantial questions as to the sudden appearance of Final Determination No. 2 and whether Final Determination No. 2 was ever included in the Postal Service's Administrative Record. The appropriate bate-stamp on Final Determination No. 1 provides further evidence that its submission was not inadvertent, as the Postal Service suggests, but rather was the Final Determination included in the Administrative Record on file with the Postal Service.

IV. Conclusion

The Public Representative urges the Commission to exclude the Postal's Service erratum from the Administrative Record. The Commission repeatedly directed the Postal Service to timely file the complete Administrative Record. The September 10th erratum flouts the Commission's prior orders concerning the filing of the Administrative Record in this proceeding. Filing a new Final Determination approximately six weeks after the filing deadline and nearly a week after the deadline for the petitioner's initial brief is highly prejudicial to all participants in this proceeding. In addition, the piecemeal filing of the Administrative Record, with multiple versions of several key documents,

raises questions about the integrity of the Administrative Record. The petitioners, commenters, and Public Representative relied on the Postal Service's three August filings in assessing the record and formulating their filings. To permit the substitute of a critical document at this late stage would deprive participants of their statutory and regulatory rights to offer their perspectives to the Commission on the final determination that is the subject of the proceeding.

Respectfully submitted,

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